89-160

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHN C. O'CONNOR,

Petitioner,

V.

ELINOR O'CONNOR (Remarried 1975)
ELINOR P. MULLIGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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33 pgs

QUESTIONS PRESENTED

I. Whether a state court's opinion and affirmation that: "<u>.. since the .. arrearages were fixed</u> (Allowing interest to be charged up to 20 years if child support arrearages remained unpaid) <u>prior to receipt of Social Security benefits, any excess</u> (Above current support for children paid to respondent) <u>may not be credited against those arrearages</u>" (As such credit would reduce petitioner's obligation in 1988 by over 60% and equal about two years income); AND whether that opinion, in despite of uniform federal precedent to the contrary, under U. S. Social Security Statutes, and the intent of Congress under effectuating Constitution Articles: No. IV, Section 1 and No. I, Section 8, can be reversed and petitioner granted relief?

II. Whether the state court's citations in support of its opinion and affirmation are fundamentally at fault in its scrutiny of the real value of money paid under Social Security benefits; and their opinion that the states have the power to rule "whether Social Security payments can be applied to arrearages in the support payments" based, as they say, on three distinct types: 1st. those accrued prior, 2nd. after the start but before current benefits are received, and 3rd. those accrued after the start of benefit payments; the court's opinion being there need be three different answers; the citations referred to being taken from six different States which leave the decision protected by the full faith & credit Article unless a U. S. Court corrects state court efforts to compensate for inflation of money by revaluation to fit equity?

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is set forth below page 1A.

The opinion of the Appellate Division

Superior Court of New Jersey is set on pages 2A - 12A, below.

JURISDICTION

The opinion of the Supreme Court of New Jersey was rendered on May 2, 1989 and filed May 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C Section 1257 (3).

STATUTES INVOLVED

STATEMENT OF THE CASE

Social Security Insurance Benefits entered into this case because when Petitioner and Respondent were married there was quite a difference in ages; he was 39 and she was 21. They had four children and she initiated divorce proceedings when the youngest child became age 1.

Respondent immediately set out to get a degree in Law and practice that profession. When the divorce was granted to her the child support payments (Alimony was not granted to her) required were lower than she expected for the reason that the Court had awarded her the sole ownership of the family home (To which Petitioner had contributed 80% of the cost) so the Court had to set child support at less than the fair market rental value so that Respondent, on the face of things, could contribute more than 50% to child support and not Peti-

tioner who would then have an advantage under Federal Tax Laws.

Meeting Law School expenses was a real problem for Respondent and she made an exceptionally large number of Complaints to the Court to try to increase her income and these actions took Petitioner away from the employment he had taken(on orders of the Court) frequently putting him in jail and eventually (in part) costing him his job.

Incidentally, another form of support which Petitioner supplied was that he had to cook food and deliver it to the house almost every weekday for the children to eat regularly.

Nine years after the divorce Respondent married a man five years older than Petitioner and which action introduced additional matter under 42 U.S.C.A. Section 402 (k)(2A), Simultaneous entitlement.

FACTUAL SUMMARY

Petitioner became 62 years old on July 15, 1973. In November 1972 he was asked to leave his engineering job with the New Jersey Department of Transportation. At that time he was indebted to divorced Respondent in the amount of $5,310.00 arrearage on child support. To pay current support and hopefully reduce arrearage, Petitioner applied for early Social Security Retirement Benefits for himself and his children. By May 1985 the youngest of the four children became 22 years old;child Benefits ceased. The total, in Social Security payments, paid to Respondent for both support and arrearages between July 1973 and June 1985 was $21,522.10 and this sum included both the Court ordered child support (Set December 30, 1970 at $70.00 per week for 4 children) and all arrearages accumulated prior to

the start of Social Security payments:

Support owed 1973 to 1985 = $14,297.50

Arrearage paid by S. S. = 7,224.60

Total Respondent was paid = $21,522.10

In addition to the above sum of Social Security Benefits, Petitioner also received old age benefits between July 1973 and June 1985 totaling $38,100.36 hence the family received a grand total of:

21,522.10 + 38,100.36 = $59,622.46.

This figure suggests a most important question of fact: Where did these Social Security moneys come from and do they have the quality of money?

Petitioner became enrolled in the Social Security system in 1937, as an employee of the Glenn L. Martin Company but after that year was self employed and paid Social Security taxes which were higher than firm employed persons, whose payments were matched by the employer. In 1966 during the divorce

hearings the Court ordered Petitioner to become employed so so there would be funds he could attach. The total amount Petitioner and his employer paid into the Social Security System was $5,582.99 hence between 1973 and 1985 over ten times what Petitioner paid into the system was paid back to his family.

During this same period the money value of the house that had been the family home rose enormously. The builder of the house put it together for about $9,000 in 1935 and sold it to the first resident for $12,000. Petitioner & Respondent bought the house in 1958 for $25,000 + sales commission of $2,500 for $27,500. They also paid interest at 5-1/2% on an $18,000 mortgage, which in the end amounted to about $8,500. The mortgage was fully paid three months after the Final Judgment of divorce was entered. Respondent sold

the house in 1974 (About the date she began to receive Social Security benefits for two of the children) for $66,000 and that purchaser in turn sold the house in 1986 for $250,000; which price reflects a money inflation rate of 10 to 1 between 1958 and 1986.

The year the divorce became final, 1967, State legislators removed the 6% ceiling on mortgage interest rates, with the result that everything went up in price (Up in current money value but of course not up in real value). People previously engaged in manufacturing sold out and went into Savings and Loan banking.

When Social Security payments began in July 1973 the arrearage owed had risen to $6,050.00. As the payments progressed it did not take until May 1985, when the youngest child reached age 22, to reduce

the arrearage to zero.

By the end of	1978	arrearage was	$3,850.00
" " "	1980	" "	2,019.60
" " "	1982	" "	189.20
By May of	1985	" Overpaid	$1,982.60

Prior to May 1988 Petitioner had never investigated to see if the arrearages had all been fully paid by Social Security payments made to Respondent. Petitioner had assumed that Respondent was content. What Petitioner did not know was that on December 29, 1970 he was handed a paper to sign which he thought was to grant garnishment of his salary entitled: "Order of Assignment Of Wages", in which for child support "all biweekly salary checks issued subsequent (to March 12, 1971), $140 of the aforesaid wages be and are hereby assigned to (The Respondent)...".

There was however another paragraph the full meaning of which was not under-

stood by Petitioner until the present proceedings began on December 3, 1987 in the form of a "Writ of Execution" based on the Order dated December 29, 1970, applied for by Respondent, but which did not come to the attention of Petitioner until May 11, 1988 when he received a "Notice of Levy" on his bank account; the delay in coming being due the custom of Respondent to take all possible legal actions on an ex parte basis and without notice to Petitioner.

The matter which Petitioner did not appreciate on December 29, 1970 was the meaning of the word "FIXED" in relation to arrearages. The words "arrearages fixed" does not mean that any differences in amount have been carefully resolved; instead "FIXED ARREARAGES" means that, from the date of fixing,interest on the amount due can be required of the debtor.

Petitioner did not discover the mean-

ing of "fixed" until after he had filed a motion to vacate the writ of execution which was denied and and the matter got into the Appellate Division of the Superior Court of New Jersey and which Court, for the first time in these proceedings decided that:

> ".. since the arrearages were fixed prior to receipt of Social Security benefits, any excess may not be credited against those arrearages".

While the case was pending before the Appellate Division the following sums of money were taken from Petitioner's bank accounts:

United Counties Trust Co.	$3,131.40
Federal Reserve Bank	16,496.35
Fixed Arrearage + Interest	19,496.35

NOTE: The "fixed arrearage" was claimed to be $7,888 as of Dec. 29. 1970.

Interest Paid = 19,496.35 - 7,888 = 11,739.75.

When Social Security payments to Respondent began in July 1973 the total arrearage, according to Petitioners data, was $6,050.00. When the Social Security payments to Respondent ceased on May 31, 1985 the excess for child support in those payments exceeded $6,050.00 by $1,982.60 meaning that Respondent was paid a total = 6,050.00 + 1,982.60 = $8,032.60 for arrearages;

Respondent was paid:

By Petitioner	7,888.00	
By Social Security	8,032.60	
Arrearage paid	$15,920.60	Total
Arrearage interest	11,739.75	
Grand total	$27,660.35	

RAISING THE FEDERAL QUESTION

An examination of the figures shown above indicates that if Social Security benefit payments were recognized moneys earned and paid by Petitioner that very little interest would be due on what

was a claimed "fixed" arrearage on December 29, 1970.

The above factual summary reflects the everpresent problems of human life where divorce has affected such a large percentage of the population; plus the practice of keeping hidden or secret legal meaning of words too sacred to be revealed to any except the initiated.

The amount of money involved in this case seems small but in two other "small money" appeals heard by the Supreme Court, where the valuation of money was important, Norman v. Baltimore & O. R. Co., 294 U.S. 240 involved (The case relating to a $1,000 bond and the amount of interest to be paid in the form of $22.50 in gold coin or $38.10 as equivalent legal tender, dollar for dollar) AND Juilliard v. Greenman, 110 U.S. 421 (The case involved an agreed price for 100 bales of cotton at $5,122.90 which the buyer tried to settle

by tendering $22.50 in gold coin, 40¢ in silver coin plus two U. S. notes, one for $5,000 and the other for $100 described as legal tender notes. The decision in this case included the following:

> "The States cannot declare what shall be money, or regulate its value".

These two cases along with Social Security Acts listed under 42 U.S.C.A. Sections 402(a); 402(d); 402(k) and the case Flemming v. Nestor, 363 U.S. 603 in which the Court stated: "..Payments under the Act are based upon the wage earner's record of earnings in employment or self-employment covered by the Act, and take the form of old-age insurance and disability insurance benefits inuring to the wage earner (known as the "primary beneficiary"), and of benefits, including survivor benefits, payable to named dependents("secondary beneficiaries")of a wage

earner", raise the federal question and point the error of of New Jersey's and other State's courts by disallowing credit to reduce child support arrearage debts with Social Security moneys under any condition.

REASONS FOR GRANTING THE PETITION

The New Jersey Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court.

The argument for the U. S. Supreme Court to lift its silence on the precise issue presented in this case is immediately above.

CONCLUSION

Petitioner respectfully submits that this petition should be granted and the judgment of the Supreme Court of New Jersey should be reversed.

July 29, 1989 By John C. O'Connor
John C. O'Connor

ORDER OF THE SUPREME COURT OF NEW JERSEY
DENYING PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-969 September Term 1988

30184

ELINOR O'CONNOR,
Plaintiff-Respondent,

vs.

JOHN C. O'CONNOR,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-5065-87T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of May, 1989.

Stephen W. Townsend
CLERK OF THE SUPREME COURT

OPINION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY FEB.21,1989

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5065-87T5

ELINOR O'CONNOR,

Plaintiff-Respondent,

v.

JOHN C. O'CONNOR,

Defendant-Appellant.

Argued January 24, 1989 -
Decided February 21, 1989

Before Judges Havey and Brochin.

On appeal from Superior Court of New Jersey, Chancery Division-Family Part, Union County.

Appellant John C. O'Connor argued the cause pro se (Mr. O'Connor on the briefs).

Francis X. Gavin argued the cause for respondent (Mulligan, Mulligan & Gavin, attorneys; William G. Mulligan on the brief).

PER CURIAM

PER CURIAM

In this post-judgment matrimonial action defendant ex-husband appeals from a June 17, 1988 order denying his motion to vacate a December 29, 1970 order which fixed support arrearages at $7,888. Defendant contends that monthly Social Security benefits received by his children to the extent that they exceeded defendant's current support obligation should have been applied against the arrearage. Defendant also contends that the trial court erred in denying defendant's motion for reconsideration of the 1970 consent order. We now affirm.

Plaintiff and defendant were divorced in October 1967.(Should be 1966). Pursuant to the judgment of divorce, defendant was ordered to pay $150 every two weeks for the support of the parties' four children. On November 24, 1970, defendant was committed to the Union

County Jail for failure to make support payments. An order of assignment of defendant's wages was entered by consent dated December 29, 1970 whereby $140 was paid directly to plaintiff out of defendant's bi-weekly wages paid by the New Jersey State Treasurer. The order also fixed arrearages at $7,888. Upon signing the consent order, defendant was released from jail.

In September 1972, defendant left his position as a engineer with the New Jersey State Highway Department and thereafter ceased paying child support. In July 1973, he began receiving Social Security benefits on an early retirement schedule. As a result of the early retirement, the parties' two remaining unemancipated children began receiving $155.40 each per month from Social Security. These payments continued until the children's graduation from

college in July 1975 and 1985 respectively.

In 1987, defendant inherited $60,000 from his sister and invested it in a treasury bill. Upon learning of the inheritance, plaintiff obtained a writ of execution on the $7,888 arrearage.

At defendant's motion to vacate the writ of attachment and the 1970 arrearage judgment, defendant testified that although he signed the 1970 consent order, the $7,888 arrearage figure did not appear on the order he signed but was added sometime thereafter. At this time, the judgment plus accrued interest totalled $19,220. In denying defendant's motion, the trial court concluded that even if defendant's factual assertion was correct, his claim should have been raised "seventeen years ago."

Defendant first argues that to the extent the Social Security payments received by his children exceeded his

current support obligation, the excess should have been applied against the $7,888 arrearages which had accrued as of December 29, 1970. We disagree.

In New Jersey, a father is ordinarily entitled to credit on his child support obligations "for Social Security dependency payments made directly to his children or for their benefit, "Potter v. Potter, 169 N.J. Super. 140, 148 (App. Div. 1979). That is because such payments are "not gratuities but were earned by the wage earner during his period of employment," and thus "must be regarded as fully substitutionary for the lost earning power". Id. at 148, 149. In Potter, the court held that a lump-sum Social Security disability payment could be used to satisfy all outstanding arrearages which had accrued during the period in which the plaintiff-father was disabled. Id. at

149; see also Pride v. Nolan, 31 Ohio Ct. App. 3d 261, ___, 511 N.E. 2d 408, 411 (1987); Children & Youth Services v. Chorgo, 341 Pa. Super. Ct. 512, ___, 491 A. 2d 1374, 1376-1378 (1985).

However, Potter does not address the question whether such Social Security payments may be applied to arrearages which have accrued prior to retirement, as here. Other jurisdictions have consistently held that any excess in the benefits over the amount needed for current support may not be credited to those arrearages. See Pride v. Nolan, supra, 511 N.E. 2d at 411; Children & Youth Services v. Chorgo, supra, 491 A. 2d at 1379-1380; Mask v. Mask, 95 N.M. 229, ___, 620 P. 2d 883, 885-886 (1980); Fuller v. Fuller, 49 Ohio Ct. App. 2d 223, ___, 360 N.E. 2d 357, 358-359 (1976); Fowler v. Fowler, 156 Conn. 569, ___, 244 A. 2d 375, 377 (1968). In so hold-

ing, these courts have concluded that a child's need for food, clothing, lodging and other necessary expenses is "current," and that such needs are not met by "the expectation of a future payment (.)" Children & Youth Services v. Chorgo, supra, 491 A. 2d at 1379, quoting McClaskey v. McClaskey, 543 S.W. 2d 832, 835 (Mo. Ct. App. 1976). To allow Social Security payments to be credited against a father's past delinquencies would "depriv(e) his children of support ....in the hope that some accrued benefit would cancel his growing default". Ibid; see also Mask v. Mask, supra, 620 P. 2d at 886. Consequently, "(w)hen the windfall comes, equitably it should inure not to the defaulting husband's benefit, but to his bereft children." Children & Youth Services v. Chorgo, supra, 491 A. 2d at 1379.

Here, defendant's $7,888 support

arrearages were fixed as of December 29, 1970. The child dependency payments made as a result of defendant's retirement were not received until July 1973. In 1975, his then support obligation was terminated, predicated on the fact that the children were receiving Social Security benefits. However, since the $7,888 arrearages were fixed prior to receipt of the Social Security benefits, any excess may not be credited against those arrearages.

Defendant next contends that the December 29, 1970 order fixing arrearages at $7,888 and the 1987 writ of execution should be vacated because he did not know of the $7,888 when he consented to the 1970 order. He argues that if he had known of the $7,888 figure, he "would have appealed" the order "for the reason that the arrearages simply were not as high as stated

in these orders". Relief from judgment or order is governed by R. 4:50-1. Application for relief under R. 4:50-1 based on mistake or fraud must be made within one year of the entry of the judgment. See R. 4:50-2. Relief under the "catch all" subsection (f) of R. 450 -1 requires application within a "reasonable time" after the order or judgment is entered. See R. 4:50-2.

Here, defendant waited 17 years before he challenged the December 29, 1970 consent order. Defendant is therefore barred by the one-year and "reasonable time" limitations under R. 4:50-2. Further, defendant fails to prove that the 1970 consent order was unjust. In his certification in support of his motion to vacate, defendant was equivocal, stating that, "I am not sure ... that I clearly say the figures 7,888 were in the December 29, 1970 order when he signed

it. (Emphasis added). However, when he appeared at the motion hearing, he was absolutely certain that the information was not in the order when he signed it.

Ordinarily, on its face, an unqualified endorsement of consent at the foot of a judgment provides evidence of consent sufficient to "bar the right of appeal." Barber v. Hohl, 40 N.J. Super. 526, 529 (App. Div. 1956). We will not disturb the trial court's fact-finding that defendant knew of the $7,888 arrearage when he consented to the December 29, 1970 order.

Further, after defendant was released from jail, his wages were assigned and $140 were deducted bi-weekly pursuant to the December 29, 1970 order. For 17 years defendant had the opportunity to make inquiry with the probation department to determine what arrearages had been fixed. His failure to do so

suggests that defendant knew of the arrearage figure and simply had no reason to appeal.

Affirmed.